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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-861

BANCROFT MANUFACTURING COMPANY, INC., ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A20) is reported at 516 F.2d 436. The decision and order of the National Labor Relations Board (Pet. App. A21-A60) are reported at 210 NLRB 1007.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1975, and a petition for rehearing was denied on October 10, 1975 (Pet. App. A61-A62). The petition for a writ of certiorari was filed on

December 18, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, where racial statements made by union agents in the course of a representation election campaign are not inflammatory and are relevant to economic issues in the campaign, the election must be overturned if the statements are not truthful, but the employer had an adequate opportunity to, and did, reply to them.

STATUTE INVOLVED

Pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at pages 2-3 of the petition. The following portions of that Act are also pertinent:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

STATEMENT

1. Pursuant to a representation petition filed by the Southern Council of Industrial Workers, United

Brotherhood of Carpenters and Joiners of America, AFL-CIO (the Union), the Regional Director of the National Labor Relations Board conducted an election among the production and maintenance employees at three Mississippi facilities of Bancroft Manufacturing Company, Inc. (the Company) (Pet. App. A34, A36). The Union won the election by a vote of 361 to 286 (Pet. App. A37, n. 2). The Company objected to the election on the ground, *inter alia*, that the Union had used false racial propaganda in the campaign. The Board overruled the Company's objections and certified the union as the bargaining agent (Pet. App. A34).

The Company then refused to bargain with the Union and, in the subsequent unfair labor practice proceeding, reiterated its objections to the election. The Board (one Member dissenting), accepting the recommendation of its Administrative Law Judge (Pet. App. A34-A35), overruled the Company's objections to the election and found that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. The Board ordered the Company, *inter alia*, to bargain with the Union upon request. (Pet. App. A28, A56-A60.)

The evidence showed that 43 percent of the Company's employees were black (Pet. App. A38, n. 3; A. 546).[1] During the election campaign, several black employees discussed with Union Organizer Sylvester

[1] "A." references are to the appendix to the briefs in the court below. A copy has been lodged with the Clerk of this Court.

Hicks, also a black, their concern that recent layoffs had affected black employees disproportionately (Pet. App. A43; A. 312, 503). Hicks explained that the Company "could lay off * * * and * * * hire anybody [it] wanted," that employees "didn't have any protection on the job," and that the solution was to negotiate a collective bargaining agreement under which employees "would be laid off * * * and recalled through seniority." At the employees' request, Hicks arranged a meeting where he stated that "seemingly the trend was * * * that the blacks were going to be laid off [and] if they didn't stick together and try to get the plant organized to where they would have some protection, it could continue on forever." (Pet. App. A47-A48; A. 507-509, 536.)

In conversations with individual employees, Hicks repeated the theme that the Union was "trying to help you colored people," and that "black[s] ought to stick together and look to the future" (Pet. App. A47-A48; A. 465, 408, 506). He also warned that, "if the blacks wouldn't stay together as a group, and the union lost the election, all the blacks would be fired" (Pet. App. A23; A. 341).

In response to Hicks' remarks, Company President Bancroft, in a speech to the assembled employees, strongly condemned racial bigotry and expressed his satisfaction that "our black employees are not being fooled by this talk" (Pet. App. A27; A. 241-242). In other communications to the employees, the Company assured them that their jobs depended solely on the employees' willingness to work and the Com-

pany's ability to compete (Pet. App. A27; A. 189, 203).

At another union meeting, Reverend Harry Buie, a black official of a local anti-poverty organization who was speaking on behalf of the Union, commented on a rumor current at the Company that a black employee had been promised a car in exchange for his efforts to solicit black votes for the Company. Reverend Buie stated that he understood that this employee was "a soul brother and the part that hurt him so bad was that it would be a sold-out soul brother" (Pet. App. A49; A. 520).

2. The Board found that Hicks' statements concerning the impact of future layoffs were not "appeals to racial prejudice on matters unrelated to [the] election issues" (Pet. App. A24), quoting from *Sewell Manufacturing Co.*, 138 NLRB 66, 71,[2] but

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[2] In *Sewell*, the employer had charged the union with "race-mixing" and had circulated to the employees photographs of interracial dancing by persons identified as union leaders. 138 NLRB at 72. The Board found that such material was not germane to the election issues and was calculated to "exacerbate racial prejudice," and that it "so lowered [permissible election] standards that the uninhibited desires of the employees could not be determined in the election" (*ibid.*). The Board ruled that henceforth "appeals to racial prejudice on matters unrelated to the election issues or to the union's activities" would afford a basis for setting aside an election (*id.* at 71). The Board added that "the burden will be on the party making use of a racial message to establish that it was truthful and germane" (*id.* at 72).

In the instant case, the Board found *Sewell* inapplicable, since the racial comments were relevant to the election issues and were not inflammatory.

were relevant to the larger issue of the advantages and disadvantages of the Union as a means of promoting economic security and jobs rights (Pet. App. A24); that they were not "unreasonably or intemperately presented to the voters, expecially in view of the record evidence that there had been three layoffs during or shortly before the campaign in which the employees laid off were mostly black employees" (Pet. App. A25); and that the statements amounted to "campaign propaganda which the employees were capable of evaluating in choosing their representative" (*ibid.*). The Board further found that Reverend Buie's statement was merely an attempt "to impugn the motives of fellow employees who [were] opposing" the Union, which is a common ingredient of organizational campaigns (Pet. App. A26).

3. The court of appeals enforced the Board's order. It found that the racial statements were not inflammatory (Pet. App. A3),[2] and agreed with the Board

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[2] In so concluding, the court pointed out that (Pet. App. A9-A10):

> Hicks and Buie voiced pro-Union and pro-black protection sentiments, but they certainly did not project a black versus white dichotomy. This campaign was waged in a bargaining unit which was 57% white and 43% black. As a matter of common sense, any attempt by the Union to set black against white would have been suicidal, for the Union could successfully organize these plants only by forging a harmonious racial amalgam. It is certainly possible that a union might fail to see its own best interests, but there is no evidence here that the Union told blacks that they ought to dominate the Union or enjoy benefits unavailable to their fellow workers. There is no

that racial statements made in an election campaign which are not racially inflammatory should be reviewed under the standards applied to any other type of alleged material misrepresentation (Pet. App. A9). In applying those standards,[4] the court found that the statements of Hicks and Buie were material misrepresentations as to which the employees had no independent knowledge (Pet. App. A8-A9, A11-A12), but that the statements did not warrant setting aside

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evidence that the Union sought to incite blacks against whites; at no time were there either acts or threats of violence, and there is certainly nothing to indicate that the black employees were less favorably disposed toward the Company than were their white coworkers, either before or after the remarks in question. In this case there was no racially-oriented campaign; the vast bulk of the literature on both sides was devoted to the economic issues ordinarily found in representation contest: whether the Union or the Company would ensure the highest wages, the best pension plans, the firmest job security. The NLRB found Buie's remarks to be nothing more than the sort of inter-employee squabbling that so often occurs in campaigns.

[4] *Hollywood Ceramics Company, Inc.*, 140 NLRB 221, establishes the following test for evaluating election campaign propaganda:

> (1) whether there has been a misrepresentation of a material fact; (2) whether the misrepresentation came from a party who was in a position to know the truth or who had special knowledge of the facts; (3) whether the other party had adequate opportunity to reply and to correct the misrepresentation; and (4) whether the employees had independent knowledge of the misrepresented facts, so that they could effectively evaluate the propaganda. [See Pet. App. A10-A11.]

the election, since the Company had ample opportunity to reply to the Union's propaganda and did so (Pet. App. A12).

ARGUMENT

It is well settled that misrepresentations made in the course of a Board-conducted representation election campaign are not grounds for setting aside the election unless "they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election." *National Labor Relations Board* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 30 (C.A. 5). Applying established principles, the court below correctly upheld the Board's finding that the racial comments here, which were a small part of an election campaign principally focused on economic issues (n. 3, *supra*), did not preclude a free and reasoned choice by the employees in the election.

Petitioners contend, however, that, under the Board's decision in *Sewell Manufacturing Company*, *supra*, where the misrepresentations concern race the election must be overturned without an assessment of the probable impact of the misrepresentations on the outcome of the election (Pet. 6-7).

As the Board explained here, however, *Sewell* concerned campaign arguments inflammatory in character which served as nothing more than appeals to racial animosity (Pet. App. A23; see also n. 2, *supra*). Where, as here, the racial statements are not inflammatory and are relevant to the issues in

the campaign, they should be evaluated like any other statements.[5] The Board and the court below properly made such an evaluation here.

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[5] See, *e.g.*, *Allen-Morrison Sign Co., Inc.*, 138 NLRB 73 (Board refused to set aside an election because the employer informed the employees that the union espoused and financially supported racial integration, stating "[w]e are not able to say that the Employer in this case resorted to inflammatory propaganda on matters in no way related to the choice before the voters," *id.* at 75); *Baltimore Luggage Company*, 162 NLRB 1230, 1233, enforced, 387 F. 2d 744 (C.A. 4) (the Board found unobjectionable propaganda which appealed to black racial pride, and which constituted "reasonable, noninflammatory appeals to * * * solidarity and economic interests"); *Hobco Manufacturing Company*, 164 NLRB 862, 863, 870-871 (the Board refused to set aside an election where the campaign included charges that black employees would be replaced by whites, since even assuming *arguendo* that the charges were untrue, they were not sufficiently widespread to affect the outcome of the election). See also *Aristocrat Linen Supply Co., Inc.*, 150 NLRB 1448, 1452; *The Archer Laundry Company*, 150 NLRB 1427, 1429-1431.

Conversely, cases where racial propaganda has been found sufficient to set aside an election have, like *Sewell*, involved inflammatory appeals. See, *e.g.*, *Bush Hog, Inc.*, 161 NLRB 1575, 1591-1593, enforced, 405 F. 2d 755 (C.A. 5); *Universal Manufacturing Corp. of Mississippi*, 156 NLRB 1459, 1462-1467; *National Labor Relations Board* v. *Schapiro & Whitehouse, Inc.*, 356 F. 2d 675, 678-679 (C.A. 4).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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